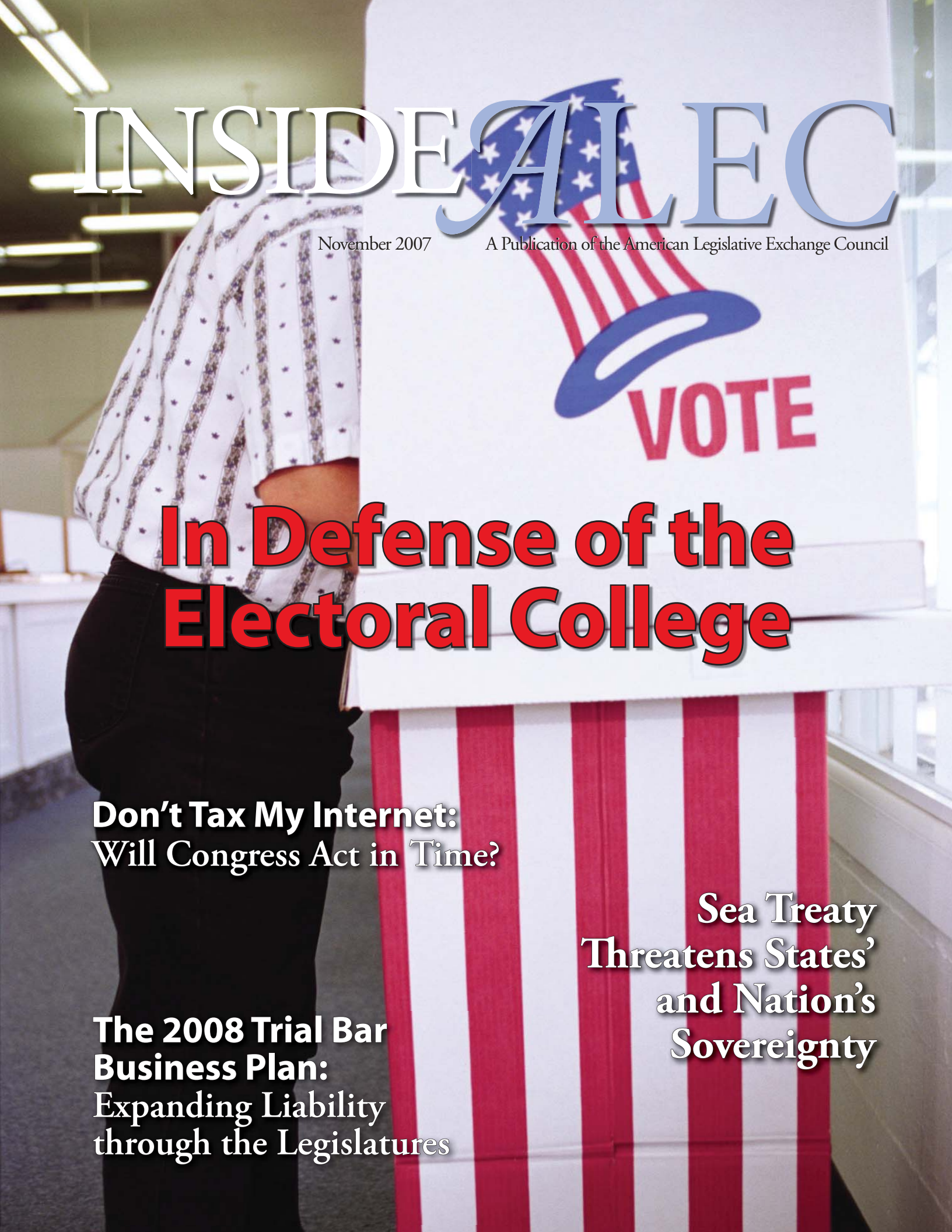

INSIDE ALEC

November 2007 A Publication of the American Legislative Exchange Council

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Sea Treaty Threatens States' and Nation's Sovereignty

The 2008 Trial Bar Business Plan: Expanding Liability through the Legislatures

Sea Treaty Threatens States' and Nation's Sovereignty

On Thursday, October 4, the Senate Foreign Relations Committee held a hearing on the Law of the Sea Treaty (L.O.S.T.). The treaty, which was originally rejected by President Ronald Reagan in 1982, has been revived with the support of the Bush administration. The treaty threatens our nation's sovereignty by allowing the United Nations (UN) to regulate sea and land pollution and enact global taxes.

Environmental protection provisions in L.O.S.T. will impact all states. Unbelievably, the treaty allows the UN to regulate pollution from "land-based sources." This will have a direct impact on all states. "The people of my state expect lawmakers, not unelected bureaucrats at the UN to make environmental and tax policy," said State Representative Susan Lynn (TN), Chair of ALEC's Commerce, Insurance, and Economic Development Task Force.

Aside from regulating our environmental polices, L.O.S.T. empowers the International Seabed Authority (ISA) to impose taxes on American companies. Natural gas and oil companies, which export minerals more than 200 miles off shore, will be forced to pay seven percent of their profits to the I.S.A. "This treaty is a terrible idea that would give the United Nations control over seven-tenths of the earth's surface," Lynn added. "We must be cautious about giving away such sovereignty because he who rules the sea will one day rule the land."

Furthermore, the UN body that will administer L.O.S.T. only gives the U.S. one vote and no veto authority. This will, in effect, allow an international body to impose environmental regulations and tax policy on our citizens without even the support of our representative at the UN—let alone voters.

ALEC Calendar

December 5-8	States & Nation Policy Summit	Washington, D.C.
May 15-18, 2008	Spring Task Force Summit	Hot Springs, AR
July 30-Aug. 3, 2008	ALEC Annual Meeting	Chicago, IL

Michael Bowman, ALEC's Senior Director of Policy and Strategic Initiatives, meets with Kimihiro Kamada, a former member of the Hokkaido Prefectural Assembly in Japan.

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The 2008 Trial Bar Business Plan:
Expanding Liability through the Legislatures

By Amy Kjose

A shift in the political climate has allowed the Trial Bar to go on the offense and attempt to expand their markets.

BACKGROUND

With the consistent rise in frivolous lawsuits in the '90s came a political climate that was increasingly friendly to the idea of tort reform. As lawmakers and constituents alike noticed the substantial economic drain created by such nocuous perversion of the law, the call for reform grew significantly louder. Many states acted upon this mandate and passed some very helpful reforms.

PROGRESS

In large part thanks to a series of tort reform measures, Texas went from being "the 'Lawsuit Capital of the World' with a Wild West litigation environment"[1] to being one of the best places to do business in the United States. Consumers have access to lower insurance premiums, plenty of jobs, and a wide variety of in-state products and services. Businesses have the confidence and money to renovate and to develop better products at lower costs. Fifteen new insurance companies entered the Texas market in 2005,[2] the same year that *Site Selection Magazine* awarded Texas the 2004 Governor's Cup award for the largest number of job creation announcements and named Texas the state with the best business climate in the nation.[3] Overall, the standard of living in Texas has improved.

Mississippi also experienced such reform success, phrased by some as the "Mississippi Miracle." Because of comprehensive tort reform legislation passed in 2002 and 2004, Mississippi went from being considered the "jackpot justice capital of America"[4] to being a place where companies are willing to bring their business. And Mississippi's economy has already begun to feel the benefits. According to State Senator Charlie Ross, author of the 2004 legislation and Chair of the Civil Justice Task Force at ALEC, in the few short years since the passage of the 2004 legislation, medical malpractice premiums are already down at least 30 percent. In the years prior to the enactment of the comprehensive reform, premiums had been rising an average of 25 percent per year. Furthermore, lawsuits against doctors are down 90 percent.[5] Mississippi constituents are faced with decreased costs thanks to the lowered premiums and filtering of lawsuits.

A NEW BATTLEFIELD

Since the passage of these much needed reforms, the political climate has somewhat shifted. Much of the general public has begun to lose sight of the need for tort reform, thinking it a problem of the past that no longer merits as much attention. While some states have passed comprehensive tort reform legislation to diminish the potential for abuse of the trial system, many states have yet to be successful in this aim, and

the states that have are, for the most part, among the minority. Still other states have passed a few select measures that have undoubtedly helped the states' economies, but these reforms are merely a piece of the puzzle. They have signaled the beginning of the fight for improved efficiency and accountability. Even in states with comprehensive reform like Texas and Mississippi, there are still measures to be passed in order to establish a truly fair playing field and circumvent future abuse.

The trial bar is continually putting time and money into R & D. The track record of the personal injury bar illustrates their uncanny ability to break down the law and hit a few jackpots along the way. As they are constantly innovating, so must we. And the battle has just become a bit more complex with the shift of political balance in state legislatures as a result of the last elections and the decreased amount of interest in tort reform. According to the American Tort Reform Association's 2007 State Tort Reform Defensive Efforts Summary, more than 80 bills in at least 30 states were introduced to expand liability. While these sorts of bills have been introduced before, the frequency and magnitude of the bills from the 2007 session suggest such a shift.

In many states, including Illinois, Washington, and New Jersey, bills were introduced that would expand the wrongful death statutes. When states initially created their legal systems, most of them allowed only for the recovery of economic damages in wrongful death cases. These economic damages have come to include a wide scope of measurable damages, even the loss of potential earnings. Over time, however, a few states have accounted for the loss of companionship, grief, sorrow, and mental suffering, in effect asking a jury to put a price on the loss of a loved one. When such emotive issues come into play in the courtroom, it becomes difficult for the jury to separate fact from feeling, and boundless awards are often the outcome. If states allow for the inclusion of these non-economic and non-tangible damages in wrongful death judgments, the resulting awards would be economically stifling for companies, and the public would be at a loss in the end. In an effort to establish predictability and bring stability to the legal system, defense against such detrimental bills should be just as important as the passage of new reforms.

In New Jersey, as well as many other states, legislation was introduced that would allow compensation for the loss of companionship in cases involving adulterated

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In Defense of the Electoral College:

The National Popular Vote Movement Threatens a Vital Part of Our Republic

By Bob Williams

We all knew it was theoretically possible but practically unlikely that someone could be elected President of the United States by winning the Electoral College vote and losing the popular vote. One of the peculiarities of our system of government, many assumed, and gave the matter no more thought. That is until George W. Bush defeated Al Gore in 2000 under just that scenario.

Since then the system established by our Founding Fathers, which has maintained our nation for more than 200 years, has struck some as not good enough, and serious efforts are being made to replace the Electoral College by a national popular vote for president. The College, however, is a vital part of our constitutional system of federalism. America is and must remain a constitutional Republic, not a direct democracy.

Part of the reason the Electoral College is in danger is because its role in our government is a mystery. Many Americans today have little knowledge of the intent behind the Electoral College and very few public schools teach about it or the reasons why it was created.

WHAT IS THE ELECTORAL COLLEGE?

The Electoral College is defined in Article II, Section I of the U. S. Constitution, which was later amended by the 12th Amendment. The College is a body of electors chosen in each state when citizens vote for a particular presidential candidate. Thus, citizens actually vote for electors, not a specific presidential candidate.

So a vote for George W. Bush in 2004 in a specific state was actually a vote for a Republican elector, just as a vote for John Kerry was actually a vote for a Democrat elector. In nearly all states the winner of the plurality votes in November wins that particular state's slate of electors. The only exceptions are Nebraska and Maine, which award electoral votes proportionally. In December, electoral ballots are cast in state capitals and the process is completed the following January when the ballots are counted before a joint session of Congress.

By adopting this system our Founders rejected the concept of direct election of the president.

EFFORTS FOR DIRECT ELECTION OF PRESIDENT

The national efforts to dismantle the Electoral College are being led by a group called National Popular Vote (NPV), which is attempting to achieve direct popular election of the president without using a constitutional amendment. The leaders of NPV are making an end-run around the difficult process of amending the

Constitution by instead asking states to pass legislation establishing a multi-state compact that would result in the direct election of our president. Their objective is to tie all the various states' electoral votes to the winner of the national popular vote, even if the majority of a state's citizens vote against that particular candidate.

The media certainly seem to welcome this change. In June, the *Los Angeles Times* editorialized in favor of NPV, stating, "This kind of end run is necessary because the only way to get rid of the Electoral College entirely is via a constitutional amendment, which would be nearly impossible to pass. Enough small states benefit from the current system to block an amendment." However, the *Times'* argument against the Electoral College shows exactly why we need it. The Founders established it to protect the rights and interests of smaller states, against the callous disregard of states that are more to the *Times'* liking.

Just how little regard does NPV have for smaller states? Enough that they can be completely excluded from the process without as much as a whimper. According to NPV's website,

> *The National Popular Vote bill would reform the Electoral College by guaranteeing the Presidency to the presidential candidate who receives the most popular votes in all 50 states (and the District of Columbia). The bill would enact the proposed interstate compact entitled the 'Agreement Among the States to Elect the President by National Popular Vote.' The compact would take effect only when enacted, in identical form, by states possessing a majority of the membership in the Electoral College (that is 270 of 538 electoral votes).*

Therefore, states that pass the NPV legislation will pledge their presidential electors to the winner of the national popular vote, rather than the state popular vote, thus assuring that the winner of the national popular vote receives a majority in the Electoral College. And it will only take the consent of states that together make up 270 electoral votes, leaving smaller states with no say at all.

As of September 2007, 43 bills have been introduced in state legislatures around the country. NPV's movement has 364 legislative sponsors in 47 states. Three state legislatures—Hawaii, California and Maryland—have

actually passed the compact. California passed it in 2006, but Gov. Schwarzenegger vetoed it. Hawaii Gov. Linda Lingle did the same when NPV passed in her state in 2007, but Maryland Gov. Martin O'Malley signed the legislation.

In 2007, NPV bills passed the Arkansas House, California Senate, Colorado Senate, and North Carolina Senate as well as both houses in Hawaii, Illinois, and Maryland. In 2006, they passed in the Colorado Senate and both houses in California.

Advocates of this movement believe the Electoral College is a relic. They believe a direct national popular vote would be more democratic, would recognize the nationwide presidential preference, and would truly carry out the dream of equal representation.

REASONS TO REJECT THE NATIONAL POPULAR VOTE AGENDA

There are many arguments against directly electing our president and for keeping our current Electoral College system. Here are just a few:

First and foremost, the Electoral College system respects the separation of and balance of power and authority between the states and the federal government.

Second, the current Electoral College system ensures that each state's electoral votes are awarded based on how the majority of the citizens of a state vote. Under the National Popular Vote Interstate Compact, however, a state's electoral votes could be awarded to a candidate that the majority of the state's citizens did not vote for. For example, Californians who supported John Kerry in 2004 by a popular vote margin of 1.2 million would have seen all their electoral votes go to George W. Bush.

Third, the Electoral College system is better suited to handle recounts because they happen at a state level. Usually recounts are limited to one or two states. The jury-rigged NPV compact allows for no recounts, since that would require adding language to the Constitution. A national recount would be extremely difficult to conduct and would be very costly and highly chaotic. There would be a flurry of coast-to-coast litigation over ballot design, alleged voting machine malfunctions, voting hours, and anything else lawyers could imagine.

Fourth, NPV could result in many additional candidates entering the presidential race, since the winner would be decided by a simple plurality. Former Sen. Daniel Patrick Moynihan (D-NY) has argued that abolishing the Electoral College would be "the most radical transformation in our political system that has ever been considered" because it would severely weaken the two-party system. The more candidates that enter the race the greater motivation there will be for additional candidates to run. In addition, candidates might enter the race in order to extract major concessions from the major party candidates in exchange for them dropping out of the race. The Electoral College system reduces voter fragmentation by forcing people to choose just a few candidates to be on the final ballot.

Fifth, the Founding Fathers rejected having the president elected by a national popular vote and instead

chose the Electoral College. Over the years Congress has rejected more than 1,000 constitutional amendments that would have changed the Electoral College, including amendments to use a popular vote system. The National Popular Vote Interstate Compact is an attempt to render void a section of the Constitution without using the established amendment method. That's dangerous ground for us to tread.

Sixth, the current Electoral College system encourages candidates to campaign in large metropolitan areas as well as rural areas and small states. This ensures that the winning presidential candidate has support from multiple regions of the country, and keeps the focus on the states as the primary entities. In contrast, NPV is about majority rule, reducing the relevancy of states, and increasing the role of ideological majorities. A very real threat under such a system is the danger of presidential elections being swung by small groups of radicals as this system would also depress voter turnout. Once voters understand that their state's Electoral College votes will simply go to the winner of the national popular vote they will realize that their individual vote has been devalued and rendered nearly worthless. Why not simply elect a president by poll?

Finally, Article 1, Section 10 of the Constitution prohibits any state, without the consent of Congress, from "entering into any Agreement or Compact with another State." Thus the NPV multi-state compact could be challenged as unconstitutional.

The current Electoral College system fulfills the American Legislative Exchange Council's mission of advancing Jeffersonian principles of federalism. States should stick with this established and constitutional system of electing the president, rejecting the attempts by NPV to do an end-run on the Constitution. It was for this reason that ALEC adopted a model resolution that supports the current Electoral College system as the best way to elect the President of the United States. ALEC's resolution urges states to defeat any legislation calling for a multi-state compact for the purpose of dismantling the current system.

Bob Williams is the president of the Evergreen Freedom Foundation. He is a national expert in the areas of fiscal and tax policies, election reform, and disaster preparedness. He received his Bachelor of Science in Business Administration from Pennsylvania State University. Bob worked as a GAO auditor of the Pentagon and Post Office before moving to Washington State where he served five terms in the Washington state legislature and was the 1988 Republican nominee for governor. He is also a member of ALEC's Board of Scholars.

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The 2008 Trial Bar Business Plan

Continued from page 3

pet food. While companionship is a legitimate and important part of owning a pet, allowing the loss of companionship to be taken into account in awards would go against sound legal practices and would be severely detrimental to the pet food industry and pet owners alike. If one could recover loss of companionship from the death of a pet, veterinarian costs would likely rise because of the increased liability that veterinarians would face and the increased insurance costs that would accompany the liability. With the significant increase in expense to the pet owner, many pets would either have to go without care or be put to sleep.

ATTEMPTS TO REVERT TO THE PAST

Not only is the Personal Injury Bar attempting to introduce new legislation to expand liability, it is attacking the reforms for which the people have so heavily called. Legislation is being introduced that would cause state economies to regress and would nullify the beneficial reforms that have been passed.

In Michigan, the law has long said that a manufacturer or seller of a drug is not liable if the drug was approved by the regulatory institution, and the drug and its labeling were in compliance with the approval when the drug left the control of the manufacturer or seller.[6] This past session, a series of bills was introduced in an attempt to repeal these laws. This would significantly decrease the predictability in Michigan's legal system, allowing companies to be sued while abiding by state and federal regulations. Insurance rates would likely increase and some businesses might be forced to go elsewhere. In the end, Michigan consumers would feel the hit. ALEC's Civil Justice Task Force has passed the *Regulatory Compliance Congruity with Liability Act* to remedy such

costly inconsistencies between the legal system and government agencies. Many of the principles of the model legislation mimic the Michigan statute.

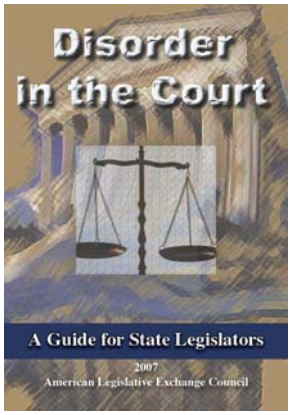
CONCLUSION

Even states, such as Texas, that have typically had a political climate in support of tort reform are under attack. At least 6 bills that would expand liability were introduced last session in Texas. Of course, it is understandable that the personal injury bar would go to such lengths to increase their business. Luckily, this session has not seen the enactment of many of these liability-expanding bills. Thanks to an engaged private sector and perceptive legislators, much of the trial lawyer offense has been held off. However, this session has likely only been an indication of what is to come. In the upcoming sessions, it is important to remember the success of existing reforms and to fight for continued economic success. Keep an eye out for attempts to expand liability and continue to push for reforms. The war isn't over. As always, the Civil Justice Task Force is here to offer support and advertise your struggles. Keep us informed and we will be here to serve as your exchange medium.

Amy C. Kjose is the Legislative Assistant to ALEC's Civil Justice and Natural Resources Task Forces.

Endnotes

1 *Tort Reform Legislation Puts Texas Back in Business*, Houston Business Journal, June 16, 2003
2 Associated Press, 2/16/05
3 Site Selection Magazine, 3/05
4 Jackpot Justice on 60 Minutes
5 Charlie Ross, Interview with the American Justice Partnership, July 2007
6 Mich. Comp. Laws § 600.2946(4), (5)



DISORDER IN THE COURT: A GUIDE FOR STATE LEGISLATORS

ALEC has recently released the 2007 Edition of the Disorder in the Court Guide for State Legislators. This legislative toolkit compiles ALEC Disorder in the Court model legislation that has been approved by the Civil Justice Task Force and the full Board of Directors. It offers model bills based on sound public policy that have been developed to safeguard the right of legislators as lawmakers and ease the drain on state economies that have been overwhelmed with frivolous lawsuits. Each model bill is accompanied by an explanatory discussion section. ALEC is also pleased to include a section in this edition that aims to educate legislators about the recent wave of legislation that has begun to appear in states that would expand liability and undo some very successful reforms that have been passed.

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Don't Tax My Internet:
ALEC Hosts Capitol Hill Briefing

By Michael Correia

Over the past decade, Internet users have remained free from burdensome state and local Internet access taxes. This is because of the protection contained within the Internet Tax Freedom Act of 1998. This law prohibits states and localities from levying new taxes on Internet access as well as multiple and discriminatory taxes on electronic commerce. Congress has extended the moratorium on three different occasions, and unless it acts by November 1, consumers could be exposed to numerous taxes from states and municipalities simply for accessing and using the Internet.

In July, ALEC members passed a resolution asking Congress to act before the current tax moratorium on Internet access expires, which would give more than 7,000 jurisdictions the ability to tax Internet access. A failure to extend this tax moratorium could slow broadband deployment, particularly in rural and low-density areas, decrease telework opportunities, and widen the digital divide.

"Congress should not allow states to put up barriers to Internet access," said state Rep. Jamie Van Fossen of Iowa, who also serves as ALEC's Public Sector Chair of the Tax and Fiscal Policy Task Force. "The Internet is too important of a tool for our Republic to have a tax as a barrier."

Indeed, the Internet tax could also hinder educational opportunities for lower-income Americans, as only 11 percent of households with incomes below $30,000 have broadband service compared to 61 percent of households with incomes above $100,000.

ALEC's office of Federal Affairs hosted a luncheon briefing on Capitol Hill on October 5 to address this issue. More than 60 Capitol Hill staff and private sector guests attended the briefing entitled, "The Internet Tax Moratorium: What are the consequences of Congressional delay?" Moderated by Jonathan Williams, ALEC's Tax and Fiscal Policy Task Force Director, the guest speakers included Congressman and ALEC Alumnus Scott Garrett of New Jersey, Maryland Delegate and ALEC Member Ronald A. George, and Broderick Johnson, Director of the Don't Tax Our Web Coalition.

From left; Jon Williams, Director of ALEC's Tax and Fiscal Policy Task Force, Rep. Scott Garrett (R-NJ), Del. Ronald A. George (MD), Broderick Johnson, Director of Don't Tax Our Web Coalition.

"When you tax something, you get less of it," said Williams. "Taxing the very technology that has fueled much of our economy's productivity growth will not be an economic or a political winner. The Internet is one of the last frontiers the tax man has been unable to conquer. Let's hope our representatives in Washington keep it that way."

If state and local governments are allowed to tax Internet access, consumers will unquestionably shoulder the burden. This would further increase the cost of doing business in the United States and would harm the tremendous growth in productivity that the creation of the Internet has provided over the past decade.

Based on the American Legislative Exchange Council's Jeffersonian principles of limited government, federalism, and individual liberty, ALEC and its members fully support permanently extending the Internet Tax Freedom Act (ITFA) and has passed a resolution supporting this stance.

Congress is currently debating different versions of legislation that would address this important issue, and is hoping to complete work by November 1. On October 16, the U.S. House of Representatives passed H.R. 3678, by a margin of 405-2. This legislation would extend the Internet Tax Moratorium an additional four years. As of this printing the U.S. Senate had not acted on any legislation.

Michael J. Correia is ALEC's Director of Federal Affairs. He may be contacted at: mcorreia@alec.org.

Member News

ALEC Supports Federal Agency's Budget to Track Union Activities

ALEC has signed on to a letter with several other national coalitions, groups, and individuals asking the United States Senate to restore the budget of the Office of Labor Management Standards (OLMS). The House of Representatives cut OLMS funding by $2 million. OLMS is responsible for investigating embezzlement of union dues, union election irregularities, and deprivation of union members' rights. According to the Wall Street Journal, OLMS has "helped secure the convictions of over 775 corrupt union officials and court-ordered restitution to union members of over $70 million in dues."

ALEC Members in Iowa Senate Elect New Leaders

ALEC Members, Sen. Ron Wieck (R-Sioux City) and Sen. Mark Zieman (R-Postville) were elected by their peers as the new Senate Minority Leader and Senate Minority Whip respectively.

ALEC Alumnus to Retire From Congress

U.S. Rep. Jim Ramstad (R-MN)

U.S. Rep. Jim Ramstad (R-MN), who co-founded the Congressional Addiction Caucus, recently announced that he will retire from the U.S. House of Representatives for the 2008 elections. Before being elected to Congress in 1990, Rep. Ramstad was an ALEC member serving three terms in the Minnesota Senate, where he was Assistant Minority Leader.

ALEC Co-Chairman in Ohio Running for Congressional Seat

Ohio State Senator Steve Buehrer

Ohio State Senator Steve Buehrer, ALEC Public Sector Co-Chairman for that state, has officially entered the race to run for the congressional seat formerly held by Paul Gillmor. Buehrer once was an intern for Gillmor, who died in an apparent fall at his Washington, D.C. home recently. Buehrer spent eight years in the Ohio House before being elected to the Senate.

ALEC Mourns Passing of John Berthoud, president of National Taxpayers Union

John Berthoud

The board of directors, staff, and members of the American Legislative Exchange Council share in the tragic and immeasurable loss of John Berthoud. From 1991-1994, John served ALEC well as its legislative director for tax and fiscal policy. Since that time, John has been a trusted advisor, intellectual confidante, and personal friend to the ALEC family. John dedicated his life to the principles that ALEC and NTU hold dear—limited government, free markets, and rugged individualism. During his journey, John inspired countless others to do the same. John never met a stranger—he had an uncanny knack of bringing friends together with his good cheer, humility, and a passion for life and liberty. John's intellectual and personal legacy will live on in the memories of his friends and in the future of our movement.

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